FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1327

JAMES A. DOOLEY,

Petitioner,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a corporation,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

HAROLD A. SMITH,
DOUGLAS C. MOIR,
EDWARD J. WENDROW,
Attorneys for Respondent.

Scheffer Printing Company, Del. 7171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1327

JAMES A. DOOLEY,

Petitioner,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a corporation,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

REASONS FOR DENIAL OF THE WRIT.

Certiorari to review the judgment of the Seventh Circuit Court of Appeals should be denied because:

(1) No federal question is involved:

The sole question is whether petitioner, acting as attorney for an Illinois administrator, had a valid attorney's lien under the Illinois Attorneys' Lien Act which attached to a recovery made by an Indiana administrator for the same death under the Federal Employers' Liability Act.

It is settled law that whether an attorney in a Federal Employers' Liability Act case has a valid attorney's lien is to be determined by the law of the state claimed to have provided for the lien. (*Dickinson* v. *Stiles*, 246 U. S. 631.)

(2) The Illinois state law was correctly applied by the Circuit Court of Appeals and the District Court:

The dissent in the Court of Appeals by Judge Evans violates the well established rule that the construction of a state statute by the highest court of the state is binding on federal courts (*Leffingwell* v. *Warren*, 2 Black 599, 603), by refusing to follow *Bremer* v. *L. E. & W. R. R. Co.*, 317 Ill. 580, 148 N. E. 241, on theory that that Illinois decision is "violative of the [Illinois] statute."

SUGGESTIONS.

Issue.

The question is whether, under the Illinois Attorneys' Lien Act, an attorney who has brought a death action under the Federal Employers' Liability Act against the Railroad on behalf of an Illinois administrator is entitled to recover a fee from the Railroad measured by the amount recovered by another administrator and another attorney appointed for the same decedent in the state of the decedent's domicile, Indiana, when the Indiana action is first reduced to judgment, thereby precluding any recovery by the Illinois administrator.

The District Court and the majority of the Court of Appeals held in the negative on the ground that petitioner-attorney failed to recover anything for his client, the Illinois administrator, and that there was nothing to which his claimed lien could attach under the Illinois Attorneys' Lien Act as construed by the Supreme Court of Illinois in an almost identical situation. (*Bremer* v. *L. E. & W. R. R. Co.*, 317 Ill. 580, 148 N. E. 241.)

Argument.

The petition for certiorari asserts that a question of federal law is involved. This is not even a colorable assertion because this court in *Dickinson* v. *Stiles,* 246 U. S. 631, held in an opinion by Mr. Justice Holmes, that whether an attorney in a Federal Employers' Liability Act case is entitled to an attorney's lien is to be determined solely under the state law.

Petitioner places his real reliance on the proposition that the Circuit Court of Appeals misinterpreted the law of Illinois, asserting that the opinion of the majority of the judges of the Circuit Court of Appeals is incorrect and that the dissent of Judge Evans is correct. That proposition can be sustained only by disregarding the decision of the Supreme Court of Illinois in *Bremer* v. *L. E. & W. R. R. Co.,* 317 Ill. 580, 148 N. E. 241, which is precisely in point, and construing the Illinois statute in a contrary manner. This is exactly what the dissenting judge in the Circuit Court of Appeals did. He did not distinguish the Illinois decision or find it inapplicable. He found it to be wrong. We submit that even in that he was erroneous—the Illinois decision is a correct construction of the Illinois statute. But, right or wrong, Illinois has construed its statute and that construction is binding on the federal judiciary.

In *Bremer* v. *L. E. & W. R. R. Co.,* 317 Ill. 580, 148 N. E. 241, the decedent, a resident of Indiana, was killed in Illinois. The Illinois public administrator took our letters of administration and was authorized by the Illinois

Probate Court to, and did, employ attorneys to sue the railroad company under the Federal Employers' Liability Act. Decedent's widow, also an Indiana resident, secured appointment of an administrator in that state. Both administrators filed action in their respective states. The Indiana action was reduced to judgment which was paid. Thereafter the attorneys for the Illinois administrator filed petition for a lien of one-third of the sum recovered in the Indiana action.

The Illinois Supreme Court held that since nothing had been recovered by the Illinois administrator, his attorneys had no claim for fees.

The only difference between the foregoing case and the case at bar is that here the main Illinois action had been dismissed at the time petitioner, Dooley, filed his petition and it therefore had been finally adjudicated that his client (the Illinois administrator) was entitled to recover nothing, while in the *Bremer* case the main Illinois action had not yet been disposed of at the time of the decision of the Illinois Supreme Court, although it was apparent that the Indiana judgment barred recovery in Illinois.

The majority opinion in this case recognized that the decision in the *Bremer* case was controlling (Tr. 69). Dissenting Judge Evans refused to follow it on the grounds "it is clearly violative of the statute" (Tr. 75). It is hardly necessary to cite authority for the proposition that it is not for a federal court to say whether a construction put on a state statute by its Supreme Court "violates" the statute. Long before *Erie Railroad* v. *Tompkins*, 304 U. S. 64, it was settled that "the construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the stat-

ute, and is as binding upon the Courts of the United States as the text." *Leffingwell* v. *Warren*, 2 Black 599, 603.

Judge Evans further went on, not to distinguish the decision factually, but to assert that the real reason for the decision was that:

> "The facts disclosed the appointment of a public administrator was unauthorized. An order of such appointment was void. The public administrator had no authority upon the facts disclosed to maintain suit on the death claim. Having no authority to bring the action he was without authority to employ counsel to bring such an action and create a lien against the cause of action therefor. * * * I think the opinion should be read as holding the public administrator could not employ the counsel and bring the action to recover for a death upon the facts shown in that case to exist." (Tr. 75.)

Petitioner, like the dissenting judge, makes no attempt to distinguish the *Bremer* case factually but adopts the above explanation (Br., p. 15).

There are two answers to these assertions:

1. There is nothing in the *Bremer* opinion which states or even intimates that the decision in the case was based on the grounds that the appointment of the public administrator was void.

2. In another case arising out of the same accident the Supreme Court of Illinois squarely held that the appointment of the Illinois public administrator could not be collaterally attacked by the railroad on the grounds that the decedent was really a resident of Indiana, and not of Illinois, at the time of his death. Such collateral attack could have been made if the appointment was void. We refer to *Bremer* v. *L. E. & W. R. R. Co.*, 318 Ill. 11, decided the

same day as the *Bremer* case in 317 Ill. 580, which was an action brought by the same public administrator for the death of another person who was killed in the same railroad wreck.

In view of the foregoing decision, both petitioner and Judge Evans are in error in attempting to explain the first *Bremer* decision on the grounds above set forth. Statements more directly contrary to the law of Illinois cannot be imagined.

Petitioner also relies upon some decisions of the Supreme Court of Illinois decided *prior* to the *Bremer* case and some decisions of the Appellate Courts of Illinois. Those that might be considered as in any way bearing on the present case are cases where there was an agreement by the attorney with the client for fees, and rendition by the attorney of services for the client and a subsequent settlement *by the defendant with the client* without withholding the amount to which the attorney was entitled under his agreement with the client. In this case respondent did not settle with petitioner's client. Petitioner also strongly relies on the recent Appellate Court decision of *Bennett* v. *C. & E. I. R. R. Co.*, 327 Ill. App. 76. We adopt as our own the Court of Appeal's clear distinction between that case and the one at bar (Tr. 70, 71).

We cannot let pass unanswered the gratuitous assertion of counsel that "The question before this court is whether a party upon whom a lien has been served can circumvent that lien merely by having another person appointed administrator" (p. 13). There is no showing that respondent had the Indiana administrator appointed, and counsel refers to no statutes of Indiana under which it would be

possible for respondent, an unliquidated damage debtor of decedent's estate, to have such appointment made even if it desired to do so.

We respectfully request that the petition be denied.

Respectfully submitted,

HAROLD A. SMITH,
DOUGLAS C. MOIR,
EDWARD J. WENDROW,
Attorneys for Respondent.

WINSTON, STRAWN & SHAW,
of Counsel.